

**Staff
Summary
Report**



**To: Mayor and City Council
Through: City Manager**

**Agenda Item Number 18b
Meeting Date: 06/20/02**

SUBJECT: City Council Concurrence of refinancing of the Orchid House by MCW Orchidhouse, L.L.C.

PREPARED BY: Dave Fackler, Development Services Manager (480-350-8530)

REVIEWED BY: Brad Woodford, City Attorney (480-350-8227)

BRIEF: Request City Council concurrence of the private refinancing of the residential condominiums at the Orchid House by MCW Orchidhouse, L.L.C.

COMMENTS: **ORCHID HOUSE (1001-03)** Request City Council concurrence of the private refinancing of the residential condominiums at the Orchid House by MCW Orchidhouse, L.L.C..

Document Name: 20020620devsrh12

Supporting Documents: Yes

SUMMARY: Staff is requesting City Council concurrence with the proposed private refinancing of the residential condominiums at the Orchid House.

HISTORY AND FACTS:

As part of the finalization of the Orchid House condominium project, MCW Orchidhouse, L.L.C. (MCW) is refinancing the residential development through Ohio Savings Bank (OSB). Because the City of Tempe has previously purchased office space within the Orchid House the City Council's concurrence with the financing is required. Attached for the City Council's review and approval is a Reaffirmation of Estoppel Certificate and Agreement document. The Reaffirmation document also gives the City the option to purchase the release of the City's office space for any reason and at anytime prior to the loan payoff.

The proposed private refinancing of the project will fund the completion of the build-out of the interior improvements of the residential condominiums. The overall loan amount for this segment of the work is increasing under this refinancing from \$12,605,343 to \$13,750,000. The initial term of this refinancing loan is until October 31, 2002

FISCAL NOTE:

This reaffirmation does not require any funding from the City.

RECOMMENDATION:

Authorize the execution of the Reaffirmation of Estoppel Certificate and Agreement document and all associated documents.

REAFFIRMATION OF ESTOPPEL CERTIFICATE AND AGREEMENT
(Brickyard on Mill/Orchidhouse Lofts Condominium)

THIS REAFFIRMATION OF ESTOPPEL CERTIFICATE AND AGREEMENT is made as of the 13th day of June 2002, by the City of Tempe, a municipal corporation (the "City") for the benefit of Ohio Savings Bank, A Federal Savings Bank ("OSB").

R E C I T A L S

A. OSB is the successor in interest by assignment to Washington Mutual Bank, FA, successor by merger to Bank United, a federal savings bank ("Prior Lender"), who made a construction loan (the "Loan") to MCW Orchidhouse, L.L.C., an Arizona limited liability company ("Borrower").

B. The City and WaMu entered into that certain Estoppel Certificate and Agreement (the "Estoppel") dated as of October 8, 1999, a copy of which is attached hereto as Exhibit A. Capitalized terms used but not defined herein shall have the meaning ascribed thereto in the Estoppel.

C. Concurrently herewith OSB is acquiring the Loan and all of WaMu's rights thereunder and with respect thereto.

D. Borrower has requested that OSB increase the amount of the Loan, extend the maturity date of the Loan and otherwise modify certain terms and provisions of the Loan, as more particularly described in that certain Third Loan Modification Agreement of even date herewith among Borrower, OSB and others (the "Modification Agreement").

E. OSB has agreed to enter into the Modification Agreement if certain conditions are met, including, without limitation, the requirement that the City execute and deliver this Agreement.

A G R E E M E N T

NOW, THEREFORE, as an inducement to OSB to enter the Modification Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City hereby agrees as follows:

1. Acknowledgment of Receipt. The City hereby acknowledges that it has received a copy of the proposed Modification Agreement.

2. Reaffirmation of the Estoppel. Except as expressly modified pursuant to the terms hereof, the Estoppel is hereby reaffirmed and ratified by the City in all respects and the City hereby agrees that the Estoppel shall continue in full force and effect with

respect to the Loan as modified by the Modification Agreement, and that OSB shall have all rights thereunder previously granted to Prior Lender.

3. Reaffirmation of Representations and Warranties. The City hereby reaffirms and ratifies all of its representations and warranties contained in the Estoppel as if set forth herein and made as of the date hereof.

4. Event of Default Under Loan. Notwithstanding anything to the contrary contained in the Estoppel, the City hereby acknowledges and agrees that, upon an event of default with respect to the Loan, the City's right to occupy the Office Unit and any portion of the Residential Unit may be terminated by OSB, and OSB may, without notice to the City, take possession of and exercise all parking rights appurtenant thereto.

5. Option. The City shall have the right, but not the obligation, to have all claims of OSB with respect to the following described properties released, upon payment of the applicable stated sum: (a) the sum of Five Hundred Thousand Dollars (\$500,000.00) for the three (3) "brownstone units" owned by the City that comprise part of the Residential Unit; and /or (b) the sum of Three Million Dollars (\$3,000,000.00) for the Office Unit (Unit 4) described in (i) the *Development and Disposition Agreement* dated October 8, 1999 among the City, 7th & Mill Parking Assessment, L.L.C., Borrower and others and (ii) the Declaration of Covenants, Conditions and Restrictions for Brickyard on Mill recorded _____, 1999 as Document No. _____ in the Official Records of Maricopa County, Arizona.

IN WITNESS WHEREOF, the City has executed this Reaffirmation of Estoppel Certificate Agreement as of the date and year first above written.

CITY OF TEMPE,
a municipal corporation

By: _____
Name: _____
Title: _____

ATTEST:

Name: _____
City Clerk

APPROVED AS TO FORM:

Name: _____

City Attorney

STATE OF ARIZONA)
) ss.

County of Maricopa)

The foregoing document was acknowledged before me this ____ day of June, 2002,
by _____, as _____ of the City of Tempe, a municipal
corporation, on behalf of the corporation.

Notary Public

My commission expires:

EXHIBIT A

ESTOPPEL

See attached.

ESTOPPEL CERTIFICATE AND AGREEMENT
(Brickyard on Mill/Orchidhouse Lofts Condominiums)

This Estoppel Certificate and Agreement ("Agreement") is made and entered into this ____ day of October, 1999, by and between City of Tempe, a municipal corporation (the "City"), and Bank United, a federal savings bank (the "Bank"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, with respect to the following:

I. Recitals.

1.1 The City, 7th & Mill Parking Assessment, L.L.C. (the "Master Project Developer"), and others, including the Residential Developer (hereinafter defined), have entered into an *Amended and Restated Development and Disposition Agreement* of approximately even date herewith (the "DDA") relating to the development of a mixed-use project to be constructed at the northeast corner of the intersection of 7th Street and Mill Avenue, Tempe, Arizona, to be known as the Brickyard on Mill (the "Master Project").

1.2 As part of the development of the Master Project, the Master Project Developer will submit the Master Project to a *Declaration of Covenants, Conditions and Restrictions for Brickyard on Mill Condominiums* (the "Declaration") and a related condominium map, each of which will be executed and recorded approximately concurrently with the execution of this Agreement, to create four condominium units.

1.3 Under the DDA, MCW Orchidhouse, L.L.C., an Arizona limited liability company (the "Residential Developer"), will be responsible for constructing the Residential Unit (Unit 3) and the Office Unit (Unit 4) described in the DDA and the Declaration.

1.4 The City and the Residential Developer have also entered into that *Agreement of Purchase and Sale and Addendum to Escrow Instructions* dated October 8, 1999, between the Residential Developer, as seller, and the City, as buyer (the "Purchase Agreement"), under which the Residential Developer will construct the Office Unit for purchase and occupancy by the City. In addition, the City has received, or will receive, an assignment of the Residential Developer's rights under that *Permanent Parking Use License and Operating Agreement* between the Master Project Developer, as licensor, and the Residential Developer, as licensee (the "Office Unit Parking License"), with respect to 28 24-hour parking permits (the "Office Unit Parking Permits"). The Residential Developer has requested a loan (the "Loan") from the Bank to allow the Residential Developer to construct the Office Unit, which Loan will be secured by a *Construction Deed of Trust, Assignment of Rents, Security Agreement and Financing Statement* from the Residential Developer to the Bank (the "Deed of Trust") to be executed and recorded approximately concurrently with the execution of this Agreement. The Deed of Trust will encumber and collaterally assign, among other things, the Residential Developer's rights under the Purchase Agreement and the DDA and the Office Unit Parking Permits prior to the conveyance and assignment of the foregoing interests from the Residential Developer to the City. As a condition to providing the Loan, the Bank has requested that the City confirm certain factual matters and agreements with respect to the DDA, the Purchase Agreement and the Office Unit Parking License.

II. Estoppel Certificate and Operative Agreements.

2.1 **Estoppel Certificate.** To induce the Bank to make the Loan to the Residential Developer, the City hereby certifies to the Bank that: (a) the copy of the Purchase Agreement attached to this Agreement as Exhibit "A" is a true, correct and complete copy of the entire agreement between the Residential Developer and the City with respect to the purchase and sale described therein; (b) the copies of the City Office Parking License and assignment thereof attached to this Agreement as Exhibits "B-1" and "B-2" are true, correct and complete copies of the entire agreement among the Master Project Developer, the Residential Developer and the City with respect to the granting and assignment of the Office Unit Parking Permits; (c) the Purchase Agreement, the Office Unit Parking License and the DDA are in full force and effect and there are no amendments, modifications, supplements, assignments, side letters or understandings, oral or written, of any sort, which modify, amend, alter, supplement, change, assign or terminate any of the provisions of any such agreement; (d) any conditions to be satisfied and covenants to be performed by the Residential Developer or the Master Project Developer, as applicable, that are necessary to the enforceability or effectiveness of the Purchase Agreement, the Office Unit Parking License or the DDA against the City have been satisfied and performed, and all deadlines set forth in the Purchase Agreement, the Office Unit Parking License and the DDA that are to have been complied with by this date have been complied with; (e) to the City's knowledge, there are no existing defaults, or events or conditions that, with the giving of notice or the lapse of time or both, would constitute a breach or default by either the City, the Master Project Developer or the Residential Developer under the Purchase Agreement, the Office Unit Parking License or the DDA; (f) the City has no existing offsets, claims or defenses to or against the enforcement of the Purchase Agreement, the Office Unit Parking License or the DDA by the Residential Developer or the Master Project Developer, as applicable; (g) the City has not assigned, transferred or encumbered its interest under the Purchase Agreement, the Office Unit Parking License or the DDA; and (h) that letter from the Bank to the Residential Developer dated October __, 1999, will, upon the satisfaction of the conditions described therein, satisfy the conditions in sections 1.2B and 1.3 of the Purchase Agreement which require evidence of a commitment for construction financing on the Orchidhouse at Brickyard on Mill. The foregoing certifications are made as of the date hereof, and shall survive the making of the Loan.

2.2 **Additional Agreements.** The City: (a) consents to the Residential Developer's encumbrance and assignment of its interest in the Purchase Agreement, the Office Unit Parking License and the DDA to the Bank as additional collateral for the Loan; (b) acknowledges that the City's entire right, title and interest in and to the Office Unit, its rights under the Purchase Agreement, any other interest the City may have in the above-ground portion of the Master Project upon which the Office Unit will be constructed, and the Office Unit Parking Permits, are subject, subordinate, junior and inferior to the lien of the Deed of Trust; (c) acknowledges that the Office Unit and Office Unit Parking Permits will be encumbered by the Bank to secure the Residential Developer's payment and performance of the Loan, and that the Office Unit and Office Unit Parking Permits will not be released from the lien of the Deed of Trust until the Loan has been fully paid and performed, regardless of whether the City has previously paid all of part of the purchase price therefor; (d) agrees that, upon the Residential Developer's default under the Loan and the Bank's election to exercise its remedies with respect to the assignment of the Residential Developer's rights under the Purchase Agreement, the Office Unit Parking License and/or the DDA, the City will render all acts, payments and performances required of the City under the terms of the Purchase Agreement, the Office Unit Parking License and/or the DDA, as applicable, directly to or at the direction of the Bank, provided that the Bank performs the Residential Developer's obligations and agreements under the applicable agreement(s), subject to any express mortgagee rights or benefits provided therein (provided, however, that unless and until